NO. 6876

United States

Circuit Court of Appeals

For the Ninth Circuit

TIMOTEO ANGCO and CIPRIANO ANGCO, minors, by VICTOR FERIL ANGCO, their uncle and next friend,

Appellants,

vs.

THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellees.

BRIEF FOR APPELLANTS UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

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BRIEF FOR APPELLANT

I. STATEMENT OF FACTS

At eight o'clock on Sunday evening, June 16, 1930 (Tr. p. 70) a Willys-Knight roadster, belonging to the Standard Oil Company of California, and driven by the Chief Engineer of the Standard Oil Company tanker "Lubrico," struck and killed the father of the plaintiffs herein. The accident occured on the island of Maui, in the Territory of Hawaii, at a point about three miles from Paia and about five miles from Kahului Harbor, where the oil tanker "Lubrico" was anchored. (Tr. p. 68) Accompanying the Chief Engineer, one Warner, was the Captain of the "Lubrico." (Tr. pp. 68-69.) The automobile was being driven at a terrific rate of speed when the accident occurred. (Tr. p. 70.) It was taken from the home of Mr. C. D. Burns, Manager of the Standard Oil Company on the island of Maui (Tr. pp. 68-69), under authorization of Mr. Burns, (Tr. pp. 67, 79) and Mr. Warner was due back on his boat at "about seven-thirty." (Tr. p. 70.) The Engineer Warner had stated that he was on his way to the boat when the accident occurred. (Tr. p. 73.) Later, he attempted to qualify this statement by saying that he had asked the Captain "if he wanted to eat," and that the Captain replied, "When we get down there we will see." (Tr. p. 73)

This conflict in Warner's testimony was never resolved.

After trial had, the judge rejected an offer to prove that the Manager Burns had authorized the use of the automobile for the purpose of transporting the men to their boat, (Tr. p. 76) and peremptorily instructed the jury to bring in a verdict for the defendants, on the short ground that the Engineer Warner was not acting within the

course and scope of his employment, nor doing anything for the benefit of nor at the request of the Company at the time the accident occurred, in spite of and assuming the facts contained in the plaintiff's offer of proof (rejected on the ground that even if the evidence offered were adduced, it would not change the result) to the effect that it was a part of the Manager Burns' very general duties to expedite the departure of Company boats, and that Burns had authorized the use of the Company car for the purpose of getting the Engineer and the Captain down to the boat, so that they could assume their duties thereon.

For example, the plaintiffs were and are ready to prove in that connection,

(a) that earlier on the day of the accident, Burns had transported the Captain to The Company Office so that the Captain could make his report there, and

(b) that Burns, testifying before the Coroner's jury prior to the trial of Warner on a manslaughter charge, said, in reply to a question put by Mr. A. E. Jenkins, Counsel for Aetna Insurance Company, about the use of the Company car by Warner:

> "Being Company Employees they took the car. A car assigned to a driver must be driven by himself, Company rules, unless we authorize someone else to drive it."

The plaintiffs appealed to the Supreme Court of Hawaii from this ruling, which court affirmed the trial judge. Judgment was rendered in accordance with this opinion, and it is from that judgment that the present appeal is prosecuted to this Court.

II. INTRODUCTION

(A) THE SUPREME COURT OF HAWAII TAKES JUDICIAL NOTICE OF THE NATURE OF THE COMMUNITIES ON THE DIFFERENT ISLANDS.

It was held in KING v. HELELIILII, 5 Hawaii 16, at 17,

that "the court will take judicial notice of the condition of the communities on the different islands." Conditions on the island of Maui, differ materially from those of the complex communities on the mainland of the United States. There is no trolley system on the island of Maui. There is a railroad system which never runs on Sunday, nor on any day between Paia and Kahului at the time at which the Captain and Engineer of the "Lubrico," found themselves at Paia when they should have been on their boat getting it ready to sail. The only means of transportation available between Paia and Kahului was by automobile, and certainly the General Manager, C. D. Burns, did not think, when he authorized them to use the Company car to go down to the harbor with all dispatch, that he was doing something that was not for the benefit of the Company, but was solely for the personal benefit of the Captain and the Engineer, as the trial judge ruled. Perhaps no one would have been more surprised than the Manager Burns if he were then told that he was not benefitting the Company in any way, but was simply sending the men off on a frolic of their own. If the President of the Standard Oil Company had been present in Paia, Burns would have felt warranted in authorizing the use of the Company car for the limited purpose of taking the Captain and Engineer to the boat. STUART v. DOYLE (Conn.) 112 Atlantic 653 at 656.

(B) THE LAW RELATING TO AUTOMOBILES AND ITS SIGNIFICANCE IN THE PRINCIPAL CASE.

Cases involving automobiles have become so numerous in the last ten years that they outnumber all other cases in our courts put together. The automobile has become so integral a part of the business and social life of America

that the law, which is concerned with, reflects, and seeks to keep abreast of practical situations as they arise, has been forced to take cognizance of that vehicle to the extent that it can now be said and must now be recognized that a somewhat new set of principles has been evolved to cover situations presented by the use of the automobile. The title, "Automobiles," in the Digest is the fastest growing title in the law. A new law of automobiles has been evolved by the course of judicial decision which has cut across the law of agency and modified its principles considerably. Within the last ten years the following exhaustive works relating exclusively to automobiles alone have been written:

SCHWARTZ on TRIAL OF AUTOMOBILE CASES
CLEVENGER'S COMPLETE NEW YORK LAW OF AUTOMOBILES
BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW
SANDERLIN ON AUTOMOBILE INSURANCE
NEW YORK LAW OF AUTOMOBILES, featuring "INJURIES TO PERSONS AND PROPERTY"
BERRY ON AUTOMOBILES
BABBIT ON MOTOR VEHICLES

The significance of this new law of Automobiles is that the emphasis has been shifted from the **agent** to the **agency**; that is to say, the inquiry now is, not simply was the man who drove the vehicle an employee of the owner of the vehicle acting within the course of the driver's employment, but rather, was the agency, the automobile, being used at the request of and for the benefit of the owner?

> "Liability for the negligence of a driver does not depend upon the strict relation of master and servant, but exists where the driver acts for the owner at his request, express or implied, for his benefit or under his direction."
>
> 2 BERRY on AUTOMOBILES 1074
>
> D'ALERIA v. SHIREY, 286 Fed. 523 (C. C. A 9th Cir.)

This is not the doctrine of "dangerous instrumentality." There, liability for the damage done by the automobile is absolute and exists independently of whether the driver was using the vehicle at the time for the benefit of and at the request of its owner or not.

ANDERSON v. COTTON OIL CO., 74 So. 975 at 978.

But the law of automobiles holds that the driver, in order to be the agent of the owner within the meaning of that law, need receive no compensation for his services:

D'ALERIA v. SHIREY, 286 Fed. 523;

NALLI v. PETERS, (N.Y. 1925) 149 N. E. 343;

ACKERSON v. JENNINGS, 107 CONN. 393, 140 ATL. 760

2 BERRY ON AUTOMOBILES, 1074;

RUBEL v. WEISS et al, 149 Atl. 756;

ALTHORF v. WOLF, 22 N. Y. 355.

Need not be driving an automobile belonging to his employer, but may be driving his own car at the time:

STUART v. DOYLE, 112 Atl. 653 (Conn. 1921)

Need not be in the employment of the owner at all:

2 BERRY on AUTOMOBILES 1074.

Need not be, if he is in the general employment of the owner, doing the thing which he had been hired to do:

D'ALERIA v. SHIREY, 286 Fed. 523;

STUART v. DOYLE, 112 Atl. 653.

In STUART v. DOYLE, 112 Atl. 653 (Supreme Court of Errors of Connecticut, Feb. 21, 1921) one O'Neil was employed by one Shepard as an office man and bookkeeper in his office at South Windsor, Conn. Shepard had men coming in from New York to work on his farm. It was the custom when men were to arrive to telephone the bookkeeper, O'Neil, who would see that they got to the farm for which they were bound. Shepard had two licensed chauffeurs and two cars which were used for that purpose. It was no part of

O'Neil's duties to drive a car at all.

The bookkeeper O'Neil's testimony with Shepard to the accident in question was as follows:

> "On August 21st in the afternoon an agency notified me at the office by telephone that two men were coming on the 4 o'clock train out of New York, arriving in Hartford about 7 o'clock. I tried to inform Shepard, but could not reach him, and as there were only two men coming I took **it upon myself to go to my home in Hartford for supper, then to meet the train and take the men up to South Windsor in my own car.** The collision occurred while I was taking the men up. It was my duty, in Shepard's absence, to give orders to one of the two licensed drivers to get the men. **My going for the men was my voluntary act; Shepard knew nothing of it; it was not what I was hired to do.**

The purport of Shepard's testimony, taken from the opinion, at page 655, follows:

> "When it was reported to the office that men were coming by train, the bookkeeper (the defendant O'Neil) usually got hold of Shepard, and he would send a chauffeur with an automobile to meet them. He had two men with driver's licenses and sent one or both if necessary. He did not know how it came about that his bookkeeper O'Neil went to the railroad station on August 21st to get a couple of men to bring out to the plantation. While he was away from the office, if telephones came in that there were men at the railroad station, O'Neil would try to get Shepard on the telephone. He did not know why O'Neil did not reach him that night. Shepard did not know that night that any men were coming. O'Neil's duties were the regular line of office work; to charge up sales, send out bills, attend to the correspondence, make up the pay roll, keep the bank balance, see to the shipping, and do whatever would come on an inside man.
> "Shepard had a light express truck and a heavy touring car and two licensed drivers to go for help in Hartford. O'Neil had a little roadster of his own, in which he drives back and forth from his home in

> Hartford five miles away. **He did not order O'Neil to go for these men in his car; it was out of the line of O'Neil's duties. O'Neil usually quit work at 5 o'clock. Shepard had no knowledge of his going for help on this occasion or on any previous occasion."** (112 A., p. 655)

The testimony of these two men, the bookkeeper O'Neil and the employer Shepard, was the only testimony in the record with regard to the authority, or rather, lack of authority, of O'Neil to do what he did in this case. The Connectitcut Court held that this did not mean that the question of the agency of O'Neil and the scope thereof became a question of law, but rather, that on the whole case, the trial court was right to submit the question of O'Neil's authority to the jury. In that connection the Connecticut Court at page 656 laid down the rules as follows:

> "Under the evidence presented, ambiguous in its nature, it was a fact for the jury to determine whether the act of O'Neil in transporting the help on the night in question was **warranted by the** express or **implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act was done.**
> "The mere fact that only two witnesses, Shepard and O'Neil, the master and the servant, testified as to O'Neil's employment and the scope of his duties, and characterized his act in transporting the help as a voluntary act, does not necessarily make the interpretation of their testimony a question of law, to be decided in accord with their characterization of O'Neil's act. The action of the trial court in submitting to the jury the question whether O'Neil was acting within the scope of his employment in transporting the help in his own automobile at the time in question was correct." (112 A. p. 656)

The Supreme Court of Errors also held that the burden was on the defense to show the availability of the two licensed chauffeurs of Shepard, if they were available at the time in question.

It should be noted:

1. That O'Neil was a bookkeeper and not a chauffeur.

2. That both O'Neil and his employer, furnishing the only testimony on the point, swore that it was no part of O'Neil's work to transport help and that what O'Neil did was after his hours of employment and solely on his own responsibility.

3. That O'Neil used his own car, and not his employer's

4. That the plaintiffs, in the case at bar, offered to prove that it was part of Burns' general duties to transport these men, to the end of expediting the departure of their boat from the Island of Maui.

A fortiori, in the case at bar, the jury could have found, under the circumstances of this case, that Burns was warranted in authorizing the use of the Company car, - that is, that he was impliedly authorized to do what he did unquestionably do, send men to the boat in the Company's automobile.

These principles are a far cry from the technical and strict law of agency as it had heretofore been understood. The limits of that law have been enlarged to meet the expanding needs of society. The only real question is: "Was the vehicle at the time the injury was done being used at the request of its owner and for that owner's benefit? When that question is answered in the affirmative, it is entirely immaterial that it had been previously used for another purpose, or under other circumstances, or that its driver happened to be doing something which he was not hired to do generally, or something which would **incidentally** be of benefit to himself as well as to the owner of the vehicle.

Under the law of automobiles the courts consider it intolerable that the owner of an automobile, (whether a corporation or a private individual can of course make no difference) should supply a vehicle for use in his business, and

when it is in fact used, by the authority of the agent or employee to whom it was entrusted, for a purpose for which he felt warranted in using it, as being for his employer's benefit, i. e., within the scope of his actual implied authority, —that thereafter the owner should seek to evade responsibility for the damage the vehicle has done while being so used, by the simple expedient of repudiating the act of his employees and agents and saying that what they were doing was on their own responsibility and for their own benefit entirely, and then having the driver-employee so testify as closely as he can.

THE PRINCIPLES OF THE COMMON LAW DO NOT PERMIT THE OWNER OF AN INSTRUMENTALITY THAT IS NOT DANGEROUS PER SE, BUT IS PECULIARLY DANGEROUS IN ITS OPERATION, TO AUTHORIZE ANOTHER TO USE SUCH INSTRUMENTALITY ON THE PUBLIC HIGHWAYS WITHOUT IMPOSING UPON OWNER LIABILITY FOR NEGLIGENT USE."

ANDERSON v. SOUTHERN COTTON OIL CO., 74 So. 975, (Fla.1917)

The test under the new law of automobiles is not only of the right to control the movements of the **driver** of the car. The test rather is in regard to the right to control the destination of the car itself, for the mere fact that the driver at the time receives no compensation for services or is not doing what he was hired to do by the terms of his general employment can make no difference in the owner's liability if the **vehicle** is used under the actual authority, either express or implied, of the owner and thus for the benefit of the owner.

(C) THE OFFER OF PROOF MADE BY THE PLAINTIFFS IS EVIDENCE IN THE CASE AT BAR.

The plaintiffs read into the record an offer of proof which was refused by the trial judge on the short ground that even if he received the evidence offered, it would not change his ruling against them. The offer consisted in substance of the following facts:

(a) That one C. D. Burns was the General Manager and the regular representative of the Standard Oil Company on the island of Maui, and that it was a part of his general duties to facilitate the passage of Company boats to or from the island of Maui, if the occasion should arise;

(b) That the said Burns authorized the engineer Warner to use the Company's car, a car which had been placed in the possession of C. D. Burns for use in Company business, for the purpose of transporting both Warner and the Captain to the harbor in order that they might earlier assume their duties on the Standard Oil Company tanker "Lubrico," which was anchored in that harbor;

(c) That there was an emergency or a sudden necessity which, aside from the general law of automobiles, justified the use of the Company's car to meet that sudden necessity, and that this way of meeting the emergency or sudden necessity was a reasonable one. And that, in any event, the use of the car was for the purpose of shortening the men's recess and thus lengthening the time of their employment.

Counsel for the defense strenuously contended before the Supreme Court of Hawaii that none of the facts in the offer of proof could be considered as evidence in the case, claim-

ing that the trial judge had exercised a discretion in refusing the offer —an alleged discretion which could not be disturbed by the Supreme Court. And this in spite of the fact that they had secured the rejection of the offer by assuming in the trial court the facts contained in the offer of proof. Of course, the position of the defendants was rejected on this point by the Supreme Court of Hawaii, which in its opinion, said:

> "Since the trial court did not base its refusal to allow the plaintiffs to reopen the case and to make the proof which they offered to make on the ground that the offer was not sufficient or that under the circumstances it came too late, **but solely on the ground that the proof, if made, would not alter the legal status of the parties**, we will pass the question of whether it was an abuse of discretion to deny the motion without comment and **treat the case as though the proof had been made.**"
>
> (Transcript of Record, page. 25.)
>
> (Emphasis ours.)

FOR, OF COURSE, IT CANNOT BE SAID IN ONE BREATH THAT THE OFFER OF PROOF WAS PROPERLY REFUSED BECAUSE IT COULD NOT CHANGE THE RESULT, AND IN THE NEXT BREATH THAT THE RESULT CANNOT BE CHANGED BECAUSE THE OFFER OF PROOF WAS PROPERLY REFUSED.

We do not anticipate that the defendant corporation will here renew a position which it could not sustain even before the Supreme Court of Hawaii. However, the most recent cases follow:

GIBSON v. GILLESPIE, 152 A. 587 (1928 Del.);
DAVIS v. CO., 296 Pa. 449, 146 A. 119;
LEDBETTER v. MARTINEZ, 12 S. E. (2) 1042;
ANDERSON v. BRYSON, 94 Fla. 1165, 115 So. 505;
SIEGAL v. CAB CO., 23 Ohio App. 438, 155 N. E. 145.
MORE v. CENTRAL GA. RY., 1 Ga. App. 514, 58 S. E. 63;
RICE v. WARE & HOOPER, 3 Ga. App. 573, 60 S. E. 301;

PARKER v. DENNISON, 249 Mo. 449, 155 S. W. 797;
BUCK v. McKEESPORT, 223 Pa. 211, 72 A. 514;
TAKULA v. STARKEY, 161 Minn. 58, 200 N. W. 811;
STURMER v. NEWBERGER CO., 94 Miss. 572, 48 So. 187;

III. ARGUMENT

(A) HOW EVIDENCE MUST BE VIEWED ON A MOTION FOR NONSUIT.

It is perfectly well settled in the authorities, beyond any doubt whatever, that on a motion for nonsuit, all the evidence adduced or offered by the plaintiff is considered as true, and that every reasonable inference from that evidence must be drawn favorable to the plaintiff's case, so that the question is IF ON ALL THE EVIDENCE ADDUCED AND OFFERED AND INFERENCES THEREFROM, a verdict for the plaintiffs were returned by the jury, would it be the duty of the appellate court to set that verdict aside as being not supported by the evidence, more than a mere scintilla? The Supreme Court of Hawaii paid lip - service to this doctrine in several well-considered cases.

IN THE MATTER OF THE ESTATE OF JULIA H. AFONG, DECD., 26 Hawaii 147, at pages 151-152:

"It is settled law in this jurisdiction that in deciding this question the evidence must be considered in the light most favorable to the contestants; that the proponent must be considered as admitting not only the facts which the contestants' evidence tends to establish but also every inference which a jury might fairly draw from such evidence."

In CHUN QUON v. DOONG, 29 Hawaii 539, at page 544, the court said:

"The motion for a nonsuit presents merely the ques-

tion of law whether the plaintiff has adduced some substantial evidence, more than a mere scintilla, sufficient, if believed, to support a finding and judgment in his favor."

(B) THE SUPREME COURT OF HAWAII'S MANNER OF VIEWING THE EVIDENCE.

Presumably under the compulsion of this rule of law, the Supreme Court of Hawaii went on to consider the evidence which was claimed by the plaintiffs to present a case for the jury as to the presence of a sudden necessity for getting the Engineer and the Captain down to the harbor, and the meeting of that necessity by the reasonable means of the Company's car, which was in the possession of the Manager of the Company on the Island for the very purpose, among others, for which it was used in this case. At any rate, a question for the jury as to the implied actual authority of Burns to so use the car, was presented. **If there was any evidence to the contrary, the defendant should have offered it for the consideration of the Court and jury.**

Mr. Warner was, it is true, placed upon on the stand by the plaintiffs. Under the circumstances, however, it is perfectly apparent that this was done very gingerly. Mr. Warner, it is perfectly clear, had the interest in the litigation of preserving his job. He was a hostile, evasive and unwilling witness. The plaintiffs were surely not bound by everything he said. See STUART v. DOYLE, supra. The only check which the plaintiffs could have had on his story and on him was a transcript of his testimony given in his manslaughter trial on Maui, and **of which the plaintiffs were not yet in possession at** the time of his examination. In reply to a question from the court (Tr. p. 75) as to when he was "due back on the boat," he replied, "I asked the chief officer when he would be ready to go and he said between 9 and 11, **so I thought to get back about 7:30.**"

Viewing this evidence most favorably to the plaintiffs, the Supreme Court said that this had no tendency whatever to show that it was really his duty to be back at the boat at that time, that is, at 7:30! The court's remarks in that connection follow:

> "It has no tendency whatever to show that the necessities of the defendant's business, in any of its aspects, required Warner to return by 7:30 o'clock or at any definite hour before the boat sailed. It only shows that he knew the hours within which the boat would sail and that he intended to return to it by a certain time.
> **Whether he intended to do this because of some duty which he as Chief Engineer was required to perform in connection with the departure of the boat, or whether he merely perferred, for his own pleasure or convenience, to spend the time intervening between 7:30 and the hour of sailing on the boat or in its vicinity does not appear."**
> (Emphasis ours.) (Transcript of Record, page 26.)

From the italicized portion of the court's remarks,it is apparent that there was at least an ambiguity in the reply of Warner as to whether it was his **duty** to be back on the boat about 7:30, or whether he merely intended to go back because he was fond of the vessel and desired to be around it as much as possible. Yet the Supreme Court, recognizing this ambiguity, resolved it in favor of the defendant corporation, an sdimply observed that "the jury was properly not permitted to speculate about this." (Tr. p. 26)

Viewing the evidence most favorably to the plaintiffs, Warner was **due back** on the boat at 7:30 or earlier, for the reason that he had duties to perform thereon pursuant to his employment as Chief Engineer of the boat. That is the natural, plain, obvious import of the question and answer. He was asked when he was "due back," i.e., when it was his **duty** to be back on the boat. The only responsive part of his reply was

"about 7:30." The portion of his answer dealing with the time of the sailing of the boat is obviously explanatory of why it was his duty to be on the boat at about 7:30—for he used the word "so" as meaning "therefore". It was his duty to return by at least 7:30, and superintend, as Chief Engineer, the preparation of the boat for sailing. The accident occurred at eight o'clock, when he should have been on the boat performing those duties, at a point at least five miles from the harbor, while he was traveling at a terrific rate of speed in a Company car whose use was authorized by the General Manager of the Company on the Island. The ambiguity in Warner's reply, taken together with the facts and inferences surrounding the authorization to use the car, together with the facts contained in the offer of proof with regard to the duty of Warner and the Captain to be on the boat an appreciable interval before the time set for sailing, and the duty of Burns to expedite their departure, certainly presented at the very least a question for the jury.

Warner was certainly not vouched for by the plaintiffs. He had every reason to color his testimony. He made it clear that the retention of his job depended on the outcome of the litigation. Under the modern rule wherein the employee and driver in an automobile case are called to the stand under circumstances such as those involved in this case, plaintiffs certainly do not "vouch" for them or their testimony, and it is for the jury to evaluate that testimony. In these cases, the employee is always anxious to keep his job and the employer is always anxious to avoid responsibility.

D'ALERIA v. SHIREY, 286 Fed. 523.

STUART v. DOYLE, supra

Certainly, in all fairness, a plaintiff who is forced to call the defendant's employee as a witness, is not bound to accept every inference that can be drawn from the testimony favorable to the defendant's case. In view of the source

thereof, any evidence adduced thereby which is favorable to the plaintiff's case is surely entitled to great weight.

(C) THE MODERN LAW AS LAID DOWN BY THIS COURT BY THE HOLDING IN D'ALERIA v. SHIREY, 286 Fed. 523 (C. C. A. 9th Cir.)

2 BERRY on AUTOMOBILES, 1074.

D'ALERIA v. SHIREY et ux, 286 Fed. 523 (Circuit Court of Appeals, Ninth Circuit, February 5, 1923. Rehearing Denied March 12, 1923.)

D'Aleria was employed by the plaintiff in error as a musician. On the night of the accident, at about eleven P. M., the plaintiff in error, who was driving the car, and the musician arrived at their hotel. The plaintiff in error went into the hotel, leaving D' Aleria to take the automobile to the garage where it was usually kept. Twenty minutes later the collision occured while the automobile was being driven by D'Aleria. **The only testimony as to what occurred from the time when he left the hotel until the accident, was furnished by D'Aleria.** He testified that the plaintiff in error told him to take the automobile to the garage, and that he replied that he would first call at a certain music store to see a music publisher. He testified that he did make the call and that thereafter he picked up a friend, whom he intended to take to the Fairmont Hotel, and that he was about to do so when the accident occurred.

Rudkin, Jr., below, instructed the jury that on this evidence they could find for plaintiff and against the plaintiff in error. The jury did so. An appeal was taken to this Court which affrimed the rulings of Rudkin, J. below.

In the Shirey case it is significant that the only testimony as to what occurred was furnished by the driver of the vehicle, who was in the employ of the defendant, and whom he later married. This Court, of course, held

that the plaintiffs were not bound by the testimony of so interested a witness. In this case Warner, the Chief Engineer, was in the employ of the defendant, and assisted the defendant corporation at every stage of the trial.

In the Shirey case the capacity in which the driver was employed by defendant had nothing to do with operating a motor vehicle. He was employed as a musician. In the instant case, therefore, the fact that the general employment of Warner was as a Chief engineer does not alter the fact that his use of the vehicle in this instance, together with the Captain, was for the owner's benefit. The Captain and Engineer were not pursuing their personal ends entirely.

D'Aleria testified in positive terms that at the time of the collision he was pursuing his own personal ends entirely. That was the only testimony on the subject, and yet the plaintiffs were allowed to recover on the theory that the main purpose of his use of the car was to take it to the garage, which was for the owner's benefit. **In the case at bar, it was uncontradicted that the main purpose of the use of the car was to transport the Engineer and the Captain to the boat.** Appellants further contend that it was under circumstances where time was an important element. It is true that Warner later offered the suggestion that, depending on the whim of the Captain, they might have decided to have a sandwich at Kahului before boarding the boat. This at most created a conflict in his testimony with regard to the use of the car, and was at variance with the rest of his testimony. The resultant conflict was never submitted to the jury. However, under the rule of D'Aleria v. Shirey, even if the men did intend "to have a sandwich," the main purpose of the trip would still be the transportation of the two officers to the boat.

Under the modern law, "liability for the negligence of

the driver does not depend upon the strict relation of master and servant, but exists where the driver acts for the owner at his request,, express or implied, for his benefit or under his direction." 2 BERRY on AUTOMOBILES 1074, D' ALERIA v. SHIREY, 286 Fed. (C. C. A. 9); ANDUHA v. COUNTY OF MAUI, 30 Hawaii 44; STUART v. DOYLE, Supra. In the case at bar the "enterprise" in which Warner and the Captain, through Burns, were engaged **and the absolutely sole interprise in which they were engaged, was that of transporting the Engineer and his Captain down to the harbor in time to perform their duties on the boat.** The car in question was taken from the garage of the Manager Burns' house in Paia. Where the men were before the situation became acute at Burns' house in Paia, is entirely immaterial. There is no question here of any "enterprise" or undertaking on the part of Burns to convey these men to or from any golf-links; the evidence finds the car which figures in this case in Paia at the home of Mr. Burns. What the men happened to be doing before they got there is entirely immaterial. Certainly, no less immaterial than was the fact that Kanahele was returning from the island of Molokai (where, from all that appears, he might have been on a vacation) in ANDUHA v. COUNTY OF MAUI, 30 Hawaii 44. In that case one Leong was employed by the County of Maui in the engineering Department. A. P. Low was then County Engineer. Leong was sent by Low to Lahaina in a Hupmobile belonging to the County for the purpose of bringing back to Wailuku one Kanahele, **who was returning from the island of Molokai,** and who was in the employ of the County as a surveyor. A collision occurred between the County's Hupmobile and the plaintiff's car on the public highway between Wailuku and Lahaina at about six o'clock in the evening, **after the driver's hours of employment.** It was contended by the defendant, the County, that Leong in driving the car was not acting within the

scope of his employment. The verdict for the plaintiff against the County of Maui was held supported by the evidence.

(D) THE LAW OF AUTOMOBILES AS ESTABLISHED BY THE MOST RECENT JUDICIAL PRONOUNCEMENTS.

It has been held, again and again, that "enterprises" far less clear in their benefit to the owner than that of getting these two men to the boat in a Company automobile was company business or for the owner's benefit.

For example, whether a banquet given after working hours for employees by a manager was within the manager's actual implied authority, was held a question for the jury in an action for injuries to an employee who was returning from the banquet in the defendant's automobile supplied by the manager, **despite the fact that the manager testified positively that the banquet was a purely personal matter; a mere gift from him to the employees under him.** ACKERSON v. JENNINGS, 107 Conn. 393; 140 Atl. 760.

Where one was employed as a salesman in a store, and also on the road, and who, after attending a baseball game, was driving his employer's automobile to the home of one with whom he had left a phonograph on trial, and an accident occurred at that time, the evidence was held to make a question for the jury as to whether he was acting within the scope of his employment at the time of the collision, and was held to support the jury's finding for the plaintiff. GOOD v. BERRIE, 123 Me. 266; 122 Atl. 630.

In CITY of ARDMORE v. HILL, 136 Okla. 200, 293 Pac. 554, the defendant was supplied with an automobile for use in the performance of his duties, which automobile he kept at his house. **On the occasion in question, he testified that he was going for groceries for his family and was not doing**

any business at all for the company. The court held that the fact that the automobile was supplied to him and kept at his house for the purpose of being used for company business, if any should arise, was sufficient to create a question for the jury as to whether the company is, under those circumstances, liable for the use of the car, and the court sustained a verdict for the plaintiff.

Where the manager of a corporation ordered an employee of a separate business to take a car to a garage, whether the employee was engaged on an errand within the scope of his employment was for the jury. DI MARCO v. THE COMPANY, 220 Ill. App. 254.

In MULLINS v. RICHIE GROCERY CO. (ARK) 1931, 35 S.W. (2d) 1010, it was held that a salesman was acting in the course of his employment, on conflicting evidence, while driving his principal's car at eleven o'clock at night.

In DILLON v. THE INSURANCE COMPANY (Calif.) 242 Pac. 736, it was held that an automobile was a reasonable means for the conveyance of an insurance agent as affecting the insurance company's liability for injuries inflicted by that automobile by the agent, and therefore it was held that the insurance agent's use of the automobile was impliedly authorized by the Company.

In KRAUSEL v. THIEME, 13 La. App. 680. 128 So. 670, an automobile salesman, while traveling home in his employer's car at night, was held acting within the scope of his employment.

In CARDOZA v. ISHERWOOD (Mass.) 154 N. E. 859, it was held that whether a dealer's employee, authorized to sell automobiles after working hours, was acting within the scope of his employment, was a question for the jury. See also CASTEEL v. YANTIS-HARPER TIRE CO., 36 S. W. (2d) 406; RYAN v. FARRELL, 280 Pac. 945; BROWN v. MONTGOMERY WARD & CO., 286 Pac. 474; JACOBSON v. BEFFA (Mo. App.) 282 S. W. 161.

SILENT AUTOMATIC SALES CORP. v. STAYTON, 45 Fed. (2d) 474; Circuit Court of Appeals for the Eight Circuit, decided November 28, 1930, rehearing denied January 10, 1931. The court said at page 474:

> "The great weight of reason and authority is to the effect that where an employee is returning from work, with the consent and by the authority of the employer, in a vehicle owned or used in the business of the employer, he is acting within the scope of his employment. Where the master places at the disposal of the servant an automobile to be used by the servant in getting to and from his work, the transportation is beneficial to both, and the relation of master and servant continues while the automobile is used for such purpose."

The fact that it is only for a single occasion does not alter the essential nature of the use of the car.

WARNE v. MOORE, 86 N. J. Eq. 710, 94 Atl. 307.

In GORMAN v. JAFFA, 248 Mich. 447, 227 N. W. 775, it was held that an employee, who, with authority, took his employer's car to go to lunch, was acting within the scope of his employment as a matter of law.

In ZONDLER v. FOSTER, 277 Pa. 98, 120 A. 705, where a general sales agent requested a truck driver to test the battery of the agent's car, and authorized the truck driver to take the agent's car home with him to dinner, and an accident occurred during the trip, it was held that it was a question for the jury whether the use of the agent's car by the truck driver was with the implied authority of the agent's master and in pursuance of his business. The court supported the jury's finding that it was.

(E) WHERE THE OWNER'S AUTOMOBILE IS USED BY AN EMPLOYEE TO SHORTEN A RECESS AND THUS LENGTHEN THE TIME OF EMPLOYMENT, THE OWNER IS UNIVERSALLY HELD LIABLE.

It has been held again and again that where a vehicle is

used to shorten the length of some holiday or recess or lunch period and thus to lengthen the time of the employment, that there the use of the vehicle is certainly for the benefit of the employer and the employer is liable for damage done at that time. Under any view of the facts, under this rule, it is not a question of "emergency" or "necessity" or anything like that at all. The rule simply is that if an employee is on a holiday, or a recess, or a lunch hour, and an automobile owned by the company is used, with the authority of the agent to whom it was entrusted, by the employee to shorten the extent of the time off and thus lengthen the time of the employment, the use of the car is for the benefit of the company at least in part, and the company is liable.

Under any view of the facts, such a case is presented here, and there is a case for the jury.

BRENNAN v. THE WHITE MOTOR C., 206 N. Y. S. 544, 210 App. Div. 533, affirmed by the New York Court of Appeals in 148 N. E. 720.

One Hames was employed by the company as head of the used-car department. His home was about a mile from his work. One evening, between 5:30 and 6:00 o'clock, he went to his home in one of the defendant's cars to get his supper. His wife was not home. He then started to the home of his wife's mother, at which time he negligently injured the plaintiff. The court said in 206 N. Y. S. at page 546, that

> ". . . . his purpose in using the car to get to his supper was to shorten the time taken in going and returning, and so lengthen the time for service. Mrs. Hames prepared the meals for her husband; getting her was an incident of getting his supper. The fact that the accident happened while going from his home after his wife cannot affect the result. The jury had a right to find that Hames, in using this car to go to his supper, was rendering a service to his employer."

See also, to the same effect:

DEPUE vs. SALMON CO. 92 N. J. Eq. 550, 106 Atl. 379;
DAVIES v. CO., 261 S. W. 401;
SNYDER v. ERICKSON, 193 Pac. 1080, Kansas 314.
GORMAN v. JAFFA, 248 Mich. 447, 227 N. W. 775
ZONDLER v. FOSTER, 277 Pa, 98, 120 A. 705
54 Cal. App. 654,

IV. CONCLUSION

The Standard Oil Company of California maintains a resident manager on the island of Maui of the Hawaiian group, out in the middle of the Pacific Ocean, whose duties are naturally very broad. (Tr. pp. 71, 72 73 and 76.) The Company furnished him with an automobile. C. D. Burns, the Manager in question. undertook the transportation of the Chief Engineer and the Captain of the oil tanker "Lubrico," anchored in the harbor at Kahului, Maui, to that harbor, and authorized their use of the Company automobile to carry out that enterprise, and for no other purpose whatsoever.

CANNON v. DUPREE, 294 S. W. 298 (1927)

> "The mutual purpose and intention was to have Mr. Taylor specially 'drive the car' to the lake as a means of transporting the parties therein. Appellant did not lend the automobile to Mr. Taylor to use at his will, and he was not to act merely as the custodian of the same, but he was to drive it in completion of the journey undertaken, and there his use was to cease. His right was simply one of driving the automobile to the end of the journey, independent of any control or claim over it. Therefore he was not merely a bailee."

The Engineer had testified that he was "due back" on the boat at "about seven-thirty." It was eight o'clock when the automobile struck and killed the father of the plaintiffs

while he and his Captain were still at a point about five miles from the harbor at Kahului.

In that connection it is worth nothing that the plaintiffs were ready to show by the offer of proof that it was the Manager Burns' general practice to furnish Company transportation for these men while they were on the Island as is natural, and that for example he had done so for the Captain of the "Lubrico" earlier on the day of the accident in order to transport the Captain to Kahului to make his report to the Standard Oil Company office there, and also that Mr. Burns, in testifying before the coroner's jury, prior to Warner's manslaughter trial, in response to a question put by the attorney for the Aetna Insurance Company concerning the use of the Company car, used the following interesting words:

> **"Being Company employees they took the car. A car assigned to a driver must be driven by himself, Company rules, unless we authorize someone else to drive it."**

The only control with which we are here concerned is the control over the movements of the car, a legal control which was never abandoned by C. D. Burns, The use to which the Captain and the Engineer were to put the car was the very limited one of transporting themselves to the harbor. Under any view of the case, the Company car was used by the authority of the Company Manager for the Company's benefit, to shorten the length of a shore leave and thus to lengthen the time of employment.

The means of transportation on the island of Maui is chiefly by automobile. This fact being well known to the Company, it furnished one of its cars to Mr. C. D. Burns, its resident manager on that island.

And yet when Mr. Burns authorized the use of the car for what he, in the reasonable interpretation of his powers considered to be for the Company's benefit, counsel for the

corporation, after the car has been so used and the damage has been done, raise the defense of no authority!

We respectfully but earnestly submit that, certainly, under the circumstances of this case, such a defense has no merit.

It is the contention of appellants that the car was entrusted by the Company to Burns so that it could be used, among others, for just such a purpose as that for which it was used in this case that is to say, the car was used for one of the purposes and to meet one of the situations which Burns was certainly impliedly authorized to meet in carrying out his duties as Manager of the Company on the island, whose duty it was to expedite the passage of the Company's boats if the occasion for it should arise, as it did in this case. The jury, and the jury alone, had the right to decide whether Burns was impliedly authorized to do what he did, i.e., whether Burns was warranted in his action (STUART v. DOYLE, supra) and whether the time element was of importance in the matter.

The Supreme Court of Hawaii seems to have required the plaintiffs to sustain a case for the jury by direct evidence Alone. But often as in this kind of case direct evidence is not available. Inferences, however, point to a concusion just as powerfully as does direct evidence. Under these circumstances the determination of the fact and scope of an agency properly remain for the jury, even where both the principal and the agent categorically deny the existence of the relation or the presence of authority.

21 R. C. L. 830, Section 6;

2 CORPUS JURIS 577, Sec. 218;

MECHEM on AGENCY 527.

STUART v. DOYLE, supra.

Here is an island in the middle of the Pacific Ocean. Here is C. D. Burns, Manager of the Standard Oil Company

on that Island. Here are the Chief Engineer and the Captain of the "Lubrico," a Company boat anchored at the harbor at Kahului. Here is the Engineer "due back" on that boat at a time when he and his Captain are still about ten miles from the harbor. Here is a Company automobile in the control of the Manager, who authorizes the two men to use the car to transport them to the Company boat. Here is an offer to show more specifically that it is Burns' duty, among other things, to expedite the Company's affairs on the Island, including the passage of the Company boats. **Here is the plaintiff's decedent killed while these men, Company employees, in a Company car, whose use was authorized by the Company manager, for what he was warranted in thinking a Company purpose, were speeding to the harbor where their boat was anchored, at a point about five miles from the harbor, and at a time half an hour after that at which the Engineer has testified that he was "due back" on the boat.**

We appeal to this Honorable Court to send the case back for a new trial.

Respectfully submitted,

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